IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 153

ELEANOR TAFT TILTON, ET AL., *Appellants,*

v.

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, ET AL., *Appellees.*

No. 569

JOHN R. EARLEY, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

## MEMORANDUM IN OPPOSITION TO MOTIONS BY THE CENTER FOR LAW AND EDUCATION, ET AL., AND THE CONNECTICUT STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL., TO FILE BRIEFS AMICI CURIAE

Motions for leave to file briefs *amici curiae* in these cases have been submitted by two different sets of organizations and individuals—The Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*[1] The appel-

[1] The brief submitted by the Center for Law and Education, *et al.* is addressed to Nos. 569 and 570, and not to No. 153. The brief submitted by the Connecticut State Conference of Branches of the NAACP, *et al.* is addressed to No. 153, as well as Nos. 569 and 570.

lants submit this Memorandum in Opposition to those motions on the sole ground that the briefs attached to both motions seek to inject into this case an issue of racial discrimination which was not presented in the pleadings, not reflected in any of the evidence presented in the trial courts and not considered by the District Courts in their dispositions of the cases.[2] Both briefs seek to attach indiscriminately the stigma of racially discriminatory practices to religiously affiliated schools which benefit from the educational assistance programs which are at issue in these cases. And both briefs urge the existence of those allegedly discriminatory practices as a basis upon which this Court should decide the appeals in these cases.

In effect, the movants are asking this Court to issue an advisory opinion on a set of hypothetical and highly speculative facts. Whether religiously affiliated schools should be constitutionally condemned for alleged racial imbalance in their student bodies presents serious and difficult questions of constitutional law. This Court has expressed extreme reluctance to deciding "important and difficult constitutional issues . . . devoid of factual context." *W. E. DuBois Clubs* v. *Clark,* 389 U.S. 309, 312 (1968). Because the so-called Equal Protection claims the movants wish to argue were not raised in the pleadings in the cases or illuminated by the evidence presented at the trials, the movants are inviting the Court to engage in constitutional adjudication in a context wholly inappropriate to such an exercise of judicial power.

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[2] The attorneys who have signed the brief on behalf of the Connecticut State Conference of Branches of the NAACP, *et al.* are acutely aware that no issue of racial discrimination exists in *Tilton* v. *Richardson,* No. 153, since they are attorneys of record for the plaintiffs in that action and they participated fully in the pre-trial discovery and the trial of that case.

Rule 40(5) requires that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." That Rule also provides that "[b]riefs not complying with this paragraph may be disregarded and stricken by the court." The blanket charges of racial discrimination levied by the movants at all religiously affiliated schools quite clearly constitutes "scandalous matter." The effort of the movants to inject the racial discrimination issue into the cases at the present stage of their proceedings constitutes "irrelevant" and "immaterial" matter. The provisions of Rule 40(5) could properly be invoked by this Court to strike their briefs if their briefs were now properly before the Court. The principle embodied in that Rule should be invoked by the Court to deny the motion for leave to file briefs *amici curiae* by the Center for Law and Education, *et al.*, and the Connecticut State Conference of Branches of the NAACP, *et al.*

Respectfully submitted,

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